PD-1299-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/23/2019 4:08 PM
Accepted 7/23/2019 4:18 PM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
7/23/2019
DEANA WILLIAMSON, CLERK

No. PD-1299-18
In the
Texas Court of Criminal Appeals
At Austin

No. 14-17-00005-CR
In the
Court of Appeals for the
Fourteenth District of Texas
At Houston

No. 2112570
In County Criminal Court at Law No. 8
Of Harris County, Texas

LESLEY DIAMOND
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S REPLY BRIEF

KIM OGG
District Attorney
Harris County, Texas

PATRICIA MCLEAN
Assistant District Attorney
Harris County, Texas
500 Jefferson
Houston, Texas 77002
Tel.: 713-274-5826
FAX No.: 832-927-0180
Counsel for the State of Texas

ORAL ARGUMENT NOT PERMITTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

REPLY TO APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

I. Appellant includes in her argument portions of Arnold's testimony that the habeas court disbelieved.

Just as the Fourteenth Court majority did, appellant erroneously includes in her *Brady* analysis Arnold's habeas testimony that he removed Gooden from casework due in part to concerns about her knowledge base and ability to answer basic questions. (Appellant's Br. – 12-13, 16-17, 22-23, 25-26, 28, 31, 34, 40, 43) *Diamond v. State*, 561 S.W.3d 288, 294, 296 (Tex. App.—Houston [14th Dist.] Oct. 23, 2018, pet. granted) (substitute op.). Similarly, appellant incorrectly avers, as the majority did, that the habeas court made no findings regarding the favorability of Arnold's purported concerns. (Appellant's Br. – 29 n.6) *See id.* at 295.

However, as discussed in the State's brief on the merits, inclusion of Arnold's purported concerns in a *Brady* analysis fails to give proper deference to the habeas court's findings of historical fact, including the express finding that, when she testified in appellant's trial, Gooden had "been simply removed from casework to focus solely on documenting issues surrounding an unrelated mislabeled blood case . . . ." (CR – 45) *See Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007) (reviewing courts should afford almost total

deference to a trial court's determination of historical facts supported by the record, especially when the fact findings are based on an evaluation of credibility and demeanor); *see also Ex parte Garcia*, 353 S.W.3d 785, 787-88 (Tex. Crim. App 2011) (noting, in an article 11.072 habeas case, that the trial judge is the sole finder of fact and there is less leeway to disregard the trial court's findings).

Moreover, the habeas judge did not fail to make a favorability finding regarding Arnold's purported concerns; he disbelieved them altogether. The trial court found that Gooden was not removed from casework because of concerns about her knowledge base or ability to answer questions, and the findings reflect this determination of historical fact. (CR – 42-46) *See Peterson*, 117 S.W.3d at 819 (reviewing courts should grant deference to implicit factual findings supporting the trial court's ultimate ruling if they can determine from the record what the implied findings are). Thus, because Arnold's purported concerns did not exist, the Fourteenth Court majority and appellant erred by including them in a *Brady* analysis.

II. Admissibility: appellant's burden and the standard of review

As a preliminary matter, appellant argues that, because one of the trial prosecutors purportedly would not have objected to use of the undisclosed evidence, the trial court would have had no reason or opportunity to prohibit appellant from cross-examining Gooden with it. (Appellant's Br. – 22) This

argument ignores, and would nullify, the requirement that a habeas applicant must show that evidence central to a *Brady* claim would have been admissible at trial. *Ex parte Miles*, 359 S.W.3d 647, 665, 669 (Tex. Crim. App. 2012). As discussed in the State's brief on the merits, the undisclosed evidence is inadmissible. Whether a particular trial prosecutor would or would not have objected to use of the evidence at trial is irrelevant.[1]

Additionally, as the Fourteenth Court majority did, appellant argues that the trial court's findings erroneously relied on Rule 608(b) as a basis to exclude the undisclosed evidence. (CR – 45-46; Appellant's Br. – 28-30) *See Diamond*, 561 S.W.3d at 295 (agreeing with appellant that Rule 608(b) does not render inadmissible at trial evidence of the mistakes in an unrelated case or Gooden's removal from casework). However, even if the trial court's reference to Rule 608(b) is considered incorrect by this Court,[2] it is of no import.

An appellate court is to uphold the trial court's ruling if it is correct under any theory of applicable law. *Ex parte Beck*, 541 S.W.3d 846, 852 (Tex. Crim. App. 2017) (reviewing denial of habeas relief under article 11.072); *see also Alford*

[1]Even if the prosecutor's assertion of what she would have done was considered relevant to a *Brady* analysis, the court's chief prosecutor was also present for appellant's trial, and he was not called to testify as to whether he would have objected to attempts to use the undisclosed evidence at trial. (RRII – 192; RRV – 100, 165, 177, 453, 749)

[2]The majority's conclusion was based on appellant's assertion that she would not have offered the evidence to attack Gooden's character for truthfulness. *See Diamond*, 561 S.W.3d at 295. However, the majority correctly noted that the evidence has no relation to whether Gooden has a propensity for being untruthful. *Id.*

v. State, 400 S.W.3d 924, 929 (Tex. Crim. App. 2013) (prevailing party in the trial court is not subject to ordinary procedural-default rules). Therefore, even if Rule 608(b) is considered by this Court to be an inapplicable theory of law in this case, denial of relief was still correct for the reasons discussed in the State's brief on the merits. *See Beck*, 541 S.W.3d at 852.

III. Appellant's Rule 702 analysis misconstrues the requirements of favorability.

Appellant argues that the undisclosed evidence is favorable, in part, because she could have used it in a Rule 702 hearing to try and exclude Gooden's testimony. (Appellant's Br. – 22-27) She also argues that the State conceded the undisclosed evidence is favorable, stating that the "acknowledgement that appellant could have used the evidence in a Rule 702-Kelly hearing constitutes an admission that the evidence was favorable under Brady." (Appellant's Br. – 27)

However, evidence is not favorable merely because a defendant could have or would have used it in trial. Favorable evidence is any evidence that, if disclosed and used effectively, may make a difference between conviction and acquittal. *Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006).

As explained in the State's brief on the merits, even if the undisclosed evidence had been used effectively in a Rule 702 hearing, it could not have led to exclusion of appellant's blood-test results or Gooden's testimony. Appellant notes that this argument relates to materiality, not favorability. (Appellant's Br. – 27 n.5)

Yet, whether undisclosed evidence may have made a difference between conviction and acquittal is the crux of a favorability analysis. Because the evidence, if disclosed and used effectively in a Rule 702 hearing, could not have led to exclusion of appellant's test results or Gooden's testimony, it could not have made a difference between conviction and acquittal.

CONCLUSION

It is respectfully requested that the lower appellate court's majority decision be reversed.

KIM OGG
District Attorney
Harris County, Texas

/s/ *Patricia McLean*
PATRICIA MCLEAN
Assistant District Attorney
Harris County, Texas
500 Jefferson
Houston, Texas 77002
(713) 274-5826
TBC No. 24081687
mclean_patricia@dao.hctx.net

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent to the following email address via e-filing:

Josh Schaffer
Attorney for Appellant
josh@joshschafferlaw.com

Stacey Soule
State Prosecuting Attorney
information@spa.texas.gov

/s/ *Patricia McLean*
PATRICIA MCLEAN
Assistant District Attorney
Harris County, Texas
500 Jefferson
Houston, Texas 77002
(713) 274-5826
TBC No. 24081687

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this computer-generated document has a word count of 1,077 words, based upon the representation provided by the word processing program that was used to create the document.

/s/ *Patricia McLean*
PATRICIA MCLEAN
Assistant District Attorney
Harris County, Texas
500 Jefferson
Houston, Texas 77002
(713) 274-5826
TBC No. 24081687

Date: 7/23/2019